2011

Davis & Sanchez, PLLC v. University of Utah HealthCare : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

DAVIS & SANCHEZ, PLLC, Plaintiff and Appellant, v. **UNIVERSITY OF UTAH HEALTHCARE,** Defendant and Appellee.	**BRIEF OF APPELLANT** Appeal from Memorandum Decision Dated January 10, 2011 Third District Court, State of Utah Judge Deno G. Himonas Case No. 100913499 Appellate Case No. 2011-0131-CA

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STATEMENT OF JURISDICTION

The Utah Supreme Court has original jurisdiction over appeals of decisions from District Courts in the State of Utah, but pursuant to Utah Code Ann. §§78A-3-102 and 78A-4-103, an appeal may be transferred by the Utah Supreme Court to the Utah Court of Appeals for decision, as was done in this case.

STATEMENT OF ISSUES

Utah Code Ann. §34A-1-309(1) states that "in a case before the commission in which an attorney is employed, the commission has full power to regulate and fix the fees of the attorney." The issue on appeal is whether this statutory provision applies only to attorney's fees calculated upon workers' compensation benefits awarded to the petitioner, as appellant argues (*see* Utah Admin. Code R602-2-4); or, whether this statutory provision comprehends any and all attorney's fees in any way related to a workers' compensation litigation, as appellee argues and the trial court found.

STANDARD OF REVIEW

The standard of review is a question of law, which the court may review for correctness. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

STATUTORY PROVISIONS

The following statutory provisions are applicable to this Court's review of the issues on appeal:

A. Utah Admin. Code R602-2-4, Attorney Fees. This rule states that, "pursuant to Utah Code Ann. §34A-1-309, the Commission adopts the following

rule to regulate and fix reasonable fees for attorneys representing applicants in workers' compensation or occupational illness claims." (Emphasis added.);

B. Utah Code Ann. §26-19-7, Medical Benefits Recovery Act. *See* particularly §26-19-7(2)(c)(ii) regarding collection agreements.

C. Utah Code Ann. §34A-1-309, Attorney Fees. This statute states that "in a case before the commission in which an attorney is employed, the commission has full power to regulate and fix the fees of the attorney."

D. Utah Code Ann. §34A-2-106, Injuries or Death Caused by [Third Parties].

E. Utah Code Ann. §34A-2-207, Noncompliance—Civil Action by Employees.

F. Utah Code Ann. §34A-2-212, Docketing Awards in District Court.

STATEMENT OF THE CASE

A. Nature of the Case. The trial court gives an accurate, brief background of the case, which is essentially repeated here. Employee, Alvaro Diaz, suffered ankle and knee injuries while working for Beehive Telephone. He received treatment for his injuries and related complications of hemophelia at, among other medical care providers, the University of Utah Hospital (the "Hospital.") The cost of the treatment "totaled in excess of $550,000.00." Complaint, ¶5 (brackets omitted); *see also* Amended Answer, ¶5. The medical care Mr. Diaz received from all medical providers (including the Hospital) totaled in excess of $2.6 million.

Mr. Diaz sought disability compensation and medical benefits for his injuries in an action before the Utah Labor Commission styled *Alvaro Diaz v. Beehive Telephone and/or Workers' Compensation Fund, Case No. 08-0020*. Davis & Sanchez (the "Law Firm") represented him in this action. The Law Firm also sought, but did not receive, consent to represent the Hospital's interests in the action before the labor commission.

The parties in the workers' compensation action, through mediation, were able to come to a compromise. As part of the compromise, the Workers' Compensation Fund, on behalf of Beehive Telephone, agreed to reimburse the medical care providers for certain medical expenses incurred in treating Mr. Diaz. More specifically, the Law Firm alleges that "[a]s a direct result of [its] efforts in mediation, the [Hospital] has been paid to date approximately $347,000.00 by the [Workers' Compensation Fund] for Mr. Diaz's medical bills." Complaint, ¶7; *see also* Amended Answer, ¶7.

Based on this recovery, the Law Firm seeks from the Hospital "[p]ayment of a 33% attorney's fee, or $114,551.00 on [the] approximately $347,000.00 already collected on behalf of [the Hospital] due to [the Law Firm's] efforts." Complaint, p. 3. The theory behind the Complaint is that the Law Firm is entitled to attorney fees under the "common fund" doctrine in order to prevent the Hospital's unjust enrichment. *See* Complaint, ¶2.

(As an update, since filing its Complaint against the Hospital, the Law Firm has recovered in a second workers' compensation litigation and subsequent

mediation, approximately $209,000.00 more for the Hospital that the Workers' Compensation Fund refused or neglected to pay under the original settlement agreement entered into following the first litigation and mediation of the same case.)

B. Course of Proceedings. In its hearing to rule on plaintiff's and defendant's competing motions for summary judgment, the Third District Court entertained three independent reasons for summary adjudication put forth by the Hospital. First, the Hospital argued that it is immune from suit under the Utah Governmental Immunity Act, Utah Code Ann. §63G-7-101, *et seq*. Second, the Hospital argued that the Law Firm "has not pled sufficient facts to invoke the common fund doctrine." Def's mem. re judgment on the pleadings, p. 5 (capitalization omitted). And third, the Hospital argued that "the Labor Commission has been delegated the exclusive authority by the legislature to award attorney's fees in worker's [*sic*] compensation cases." *Id*., p. 6 (capitalization omitted).

C. Disposition at Trial Court. The trial court found that the third argument, which is essentially an argument that the District Court lacks subject matter jurisdiction, was dispositive. Judge Himonas, therefore, declined to address the governmental immunity and common fund arguments at all, except to opine in passing that courts have long recognized a common law exception to governmental immunity for equitable claims, which the Law Firm's claim is.

The crux of Judge Himonas' ruling is that "the Labor Commission plainly has the authority and jurisdiction to address all attorney fee issues: 'In a case before the comission in which an attorney is employed, the comission has full power to regulate and fix the fees of the attorney.' Utah Code Ann. §34A-1-309(1) (emphasis in original). This sweeping language is not limited, as the Law Firm argues, to fees paid by the injured party. Rather, the provision comprehends all of the fees related to the workers' compensation litigation." Judge Himonas' Memorandum Decision dated January 10, 2011, pp. 5-6. (Emphasis added.)

SUMMARY OF THE ARGUMENT

The trial court's interpretation of Utah Code Ann. §34A-1-309(1) is far too broad. The statute reads: "[I]n a case before the commission in which an attorney is employed, the commission has full power to regulate and fix the fees of the attorney." Were this statute to be applied in the sweeping manner Appellee and the trial court argue it should be, then any attorney employed in any case before the labor commission—or employed in any case in civil court based upon the same accident or injury—must be paid attorney's fees in accordance with labor commission rules. This is not the case in practice.

In its Memorandum Decision, the trial court quotes *Stokes v. Flanders*, 970 P.2d 1260 (Utah 1998), as follows: "On its face, this provision gave the Commission broad authority to 'regulate' and 'fix' attorneys fees. . . . Consequently, because the Commission has the power and jurisdiction to fix the Law Firm's fee, this court lacks jurisdiction. *See Id.*, at 1265. ('[T]he Commission

has exclusive jurisdiction to determine the lawfulness of attorney fees charged in cases brought before it, whether the case was successful or not.'); *see also Sheppick*, 922 P.2d at 773 ('District courts have no jurisdiction whatsoever over cases that fall within the purview of the Worker's Compensation Act.') (Citations omitted.)" Judge Himonas' Memorandum Decision dated January 10, 2011, p. 6.

What the trial court fails to cite from the *Stokes* case is the following language: "The Supreme Court of Utah has ruled that the Commission's power to fix attorney's fees 'applies only to the fixing of fees of an attorney out of any award made to his client and does not authorize the Industrial Commission to assess attorney's fees as costs against either party.' *Stokes*, quoting *Graham v. Industrial Commission*, 27 Utah 2d 279, 495 P.2d 806 (Utah 1972)." (Emphasis added.)

Finally, the Supreme Court in *Olympus Oil, Inc. v. Harrison*, 778, P.2d 1008 (Utah App. 1989) held "that the Commission is not statutorily authorized to make awards of attorney's fees in addition to awards of compensation benefits." (Emphasis added.) Put another way, the commission has no business making awards in civil court cases.

ARGUMENT

A. The Attorney's Fees of Workers' Compensation Defense Attorneys are Not Regulated or Fixed by the Commission.

Insurance company defense attorneys who practice before the labor commission do not have their attorney's fees regulated or fixed by the

commission. Neither are disputes between workers' compensation insurance company defense attorneys and their insurance company clients regarding attorney's fees regulated or fixed by the commission. Utah Admin. Code R602-2-4 plainly states that, pursuant to Utah Code Ann. §34A-1-309 authorizing the commission to regulate and fix reasonable fees for attorneys, that its purpose is "to regulate and fix reasonable fees for attorneys representing applicants in workers' compensation or occupational illness claims." (Emphasis added.)

B. In Cases Where a Workers' Compensation Claim Gives Rise to a Third-Party Personal Injury Action in Civil Court, the Attorney's Fees of the Civil Parties' Attorneys are not Regulated or Fixed by the Commission.

Attorneys who litigate a third-party personal injury claim in District Court, where there has been, is currently, or will be a workers' compensation injury claim at the labor commission involving the same plaintiff, the same accident or work injury, and, conceivably, even the same plaintiff's attorney, do not have their personal injury attorney's fees regulated or fixed by the labor commission. Utah Code Ann. §34A-2-106 sets forth an employee's right to pursue a claim in civil court against a liable third party in a workers' compensation claim. This right is frequently exercised, and many of these so-called third-party claims are heard in civil court. The district court maintains full jurisdiction over such proceedings and does not require that the attorney's fees involved in the civil action be regulated or fixed by the labor commission.

The term "third party," as quoted in various parts of the Workers' Compensation Act, refers to any non-party to the workers' compensation process. It is clear from the plain language of the Act, and from the actual practice of law, that the legislature did not intend to comprehend all of the attorney's fees in a third-party case tangentially "related" to the workers' compensation litigation, as the trial court holds, but only those involving attorney's fees paid on an injured worker's benefits to his attorney.

Similarly, Utah Code Ann. §34A-2-207 gives injured workers the right to pursue a civil claim against an employer if that employer carries no workers' compensation insurance. Again, it is clear from the plain language of the Act, and from the actual practice of law, that the labor commission does not have sweeping jurisdiction over all attorney's fees tangentially "related" to the workers' compensation litigation.

Finally, Utah Code Ann. §34A-2-212 provides that judgments made by the Utah Labor Commission may be docketed in the District Court for collection. More specifically, §34A-2-212(2)(b) provides for "reasonable attorney's fees and court costs in addition to the judgment award." One could argue that attorney's fees in this case are allowed only because the labor commission, or the Act, expressly grants them. However, it should be noted that the additional attorney's fees sought to enforce a judgment in District Court would actually be awarded by the District Court, not the labor commission. It can be argued with a straight face that the statute does not grant additional attorney's fees but merely

acknowledges the District Court's discretion to award additional fees and costs over and above what the labor commission awarded in judgment.

C. In Cases Where a Workers' Compensation Claim Gives Rise to a Medicaid Lien, the Attorney's Fees of the Petitioner's Attorney Paid by Medicaid are not Regulated or Fixed by the Commission.

Attorneys who litigate a workers' compensation claim for an injured worker and at the same time follow statutorily-mandated procedures to protect the subrogation interests of Utah Medicaid by executing a collection agreement with the Office of Recovery Services, do not have their Medicaid-paid attorney's fees regulated or fixed by the Commission.

Utah Code Ann. §26-19-7 provides that "a [Medicaid recipient] may not file a claim, commence an action, or settle, compromise, release, or waive a claim against a third party for recovery of medical costs for an injury disease, or disability for which [Medicaid] has provided or has become obligated to provide medical assistance without [Medicaid's] written consent." This statute also applies to a Medicaid recipient's attorney. Further, §26-19-7(2)(c)(ii) provides that "if the recipient's attorney enters into a written collection agreement with the department, or includes the department's claim in the recipient's claim or action pursuant to Subsection (4), the department shall pay attorney's fees at the rate of 33.3% of the department's total recovery and shall pay a proportionate share of the litigation expenses directly related to the action." (Emphasis added.)

In fact, §26-19-7(9) provides that a "recipient's attorney who knowingly and intentionally fails to comply with this section is liable to the department for (a) the amount of the department's claim or lien pursuant to Subsection (5); (b) a penalty equal to 10% of the amount of the department's claim; and (c) attorney's fees and litigation expenses related to recovering the department's claim." In short, Utah Medicaid law—not the labor commission or the Workers' Compensation Act—specifically directs payment of attorney's fees to attorneys (even workers' compensation attorneys) who protect Medicaid's subrogation interests. In fact, Medicaid law makes an attorney liable for the lien amount, penalties, and attorney's fees and costs to collect the funds from the attorney if he does not comply. Certainly, it cannot be argued that the labor commission "regulates and fixes" the fees of the workers' compensation attorney in this scenario.

D. In Cases Where a Workers' Compensation Claim Gives Rise to a Subrogation Lien by a Health Insurance Carrier or a Medical Care Provider, the Attorney's Fees of the Petitioner's Attorney Paid by the Insurer or Provider are not Regulated or Fixed by the Commission.

Attorneys who litigate a workers' compensation claim for an injured worker and at the same time agree to protect the subrogation interests of the injured worker's health insurer or medical care provider by mutual agreement, do not have attorney's fees that are paid by the health insurer or medical-care provider regulated or fixed by the Commission. It is an almost-ubiquitous practice among personal injury, workers' compensation, and other similarly-remunerated

attorneys to negotiate privately with a health insurer or a medical care provider for a reduction in its subrogation lien in exchange and as payment for the plaintiff's attorney protecting the party's interest in the settlement or judgment. All this is done without the labor commission regulating or fixing the fees of the attorney. The appellant Law Firm has done so numerous times itself in the course of business over the years, as have most, if not all, of its sister firms in the personal injury legal fraternity. Indeed, an award of additional attorney's fees over and above what the labor commission awards is the only incentive some firms have to practice workers' compensation law at all, it being the only way the firm can afford to help injured workers, get paid according to statutory attorney's fee caps, and still remain in business.

CONCLUSION

Appellant respectfully requests that the decision of the Third District Court be overturned and that the case be remanded to District Court for further consideration of the two issues intentionally ignored at the trial court level: Plaintiff's right to collect attorney's fees (1) under the government immunity act as currently interpreted in case law, and (2) under the doctrines of common fund and unjust enrichment.

DATED this 27 day of April, 20 11.

DAVIS & SANCHEZ, PLLC

Halston T. Davis (8998)
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **BRIEF OF APPELLANT** was served via:

x first-class mail, postage prepaid
□ email (internet mail server)
□ facsimile machine
□ hand delivery

upon the following:

Brent A. Burnett, Assistant
UTAH ATTORNEY GENERAL
160 E 300 S, Fifth Floor
Salt Lake City, UT 84114-0858

Attorney for Appellee

DATED this 27 day of April, 20 11.

Halston T. Davis

ADDENDUM 1

Memorandum Decision of Trial Court Dated January 10, 2011

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DAVIS & SANCHEZ, PLLC, Plaintiff, v. UNIVERSITY OF UTAH UNIVERSITY HEALTH CARE, Defendant.	MEMORANDUM DECISION Case No. 100913499 Judge: Deno G. Himonas

INTRODUCTION

Plaintiff, the law firm of Davis & Sanchez (the "Law Firm"), and defendant, University of Utah University Health Care (the "Hospital"), brought cross-motions for judgment on the pleadings pursuant to Rule 12 of the Utah Rules of Civil Procedure. However, in as much as the parties presented "matters outside the pleadings," I treat the motions as having been brought for summary judgment under Rule 56 and dispose of them accordingly. Ut. R. Civ. P. 12.

BACKGROUND

Alvaro Diaz suffered ankle and knee injuries while working for Beehive Telephone. He received treatment for his injuries and for allegedly related complications at, among other medical care providers, the Hospital. The cost of the treatment "totaled in excess of $550,000.00." Complaint, ¶ 5 (brackets omitted); *see also* Amended Answer, ¶ 5.

Mr. Diaz sought disability compensation and medical benefits for his injuries in an action before the Utah Labor Commission styled *Alvaro Diaz v. Beehive Telephone and/or Workers Compensation Fund*, case no. 08-0020. The Law Firm represented him in this action. The Law Firm

also sought, but did not receive, consent to represent the Hospital's interests in the action before the Labor Commission.

The parties in the workers' compensation action, through mediation, were able to come to a compromise. As part of the compromise, the Workers' Compensation Fund, on behalf of Beehive Telephone, agreed to reimburse the medical care providers for certain medical expenses incurred in treating Mr. Diaz. More specifically, the Law Firm alleges that "[a]s a direct result of [its] efforts in mediation, the [Hospital] has been paid to date approximately $347,000.00 by the [Workers' Compensation Fund] for Alvaro Diaz's medical bills." Complaint, ¶ 7; *see also* Amended Answer, ¶ 7.

Based on this recovery, the Law Firm seeks from the Hospital "[p]ayment of a 33% attorney's fee, or $114,551.00, on [the] approximately $347,000.00 already collected on behalf of the [the Hospital] due to [the Law Firm's] efforts." Complaint, p. 3. The theory behind the Complaint, while not altogether clear, appears to be that the Law Firm is entitled to attorney fees under the "common fund" doctrine in order to prevent the Hospital's unjust enrichment. *See* Complaint, ¶ 2.

ANALYSIS

The Hospital has advanced three independent reasons for summary adjudication. First, the Hospital argues that it is immune from suit under the Utah Governmental Immunity Act, Utah Code Ann. § 63G-7-101, *et seq.* Second, it argues that the Law Firm "has not pled sufficient facts to invoke the common fund doctrine." Def's mem. re judgment on the pleadings, p. 5 (capitalization omitted). And third, it argues that "the Labor Commission has been delegated the exclusive

authority by the legislature to award attorney's fees in worker's [*sic*] compensation cases." *Id.*, p. 6 (capitalization omitted).

The third argument, which is essntially an argument that the district court lacks subject matter jurisdiction, is dispositive. Therefore, I decline to address the governmental immunity and common fund arguments.[1]

The "primary objective" of Utah's courts in "interpreting statutes is to give effect to the legislature's intent. To discern legislative intent, we look first to the statute's plain language." *State v. Harker*, 2010 UT 56, ¶ 12, 240 P.3d 780 (internal quotation marks and citations omitted). In doing so, "we read the plain language of a statute as a whole and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Id.*, (internal quotation marks, brackets, and citations omitted).

It is apparent from the plain language of Utah's Labor Commission and Workers' Compensation Acts (Utah Code Ann. § 34A-1-101, *et seq* and Utah Code Ann. § 34A-2-101, *et seq*, respectively)[2] that the legislature intended that the Labor Commission determine the award of attorney fees attendant to a workers' compensation action. Section 34A-1-301 provides that the "commission has the duty and full power, jurisdiction, and authority to determine the facts and apply

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[1]A court must first satisfy itself that it has subject matter jurisdiction. It should conclude its inquiry when it determines that jurisdiction is lacking. *See Western Water, LLC v. Olds*, 2008 UT 18, ¶ 16, 184 P.3d 578.

[2]The legislature amended both Acts in 2008 and 2009. Because neither party has addressed the differences between the provisions previously in place and those currently in place, and because the changes do not appear to impact my analysis, I quote from the current version of the code.

the law in this chapter [34A-1] or any other title or chapter it administers," including the Workers' Compensation Act. *See* Utah Code Ann. § 34A-1-103(1).[3]

The power and jurisdiction of the Labor Commission encompasses the determination of "whether medical, nurse, or hospital services" are compensable under the Workers' Compensation Act. Utah Code Ann. § 34A-2-409(11). Indeed, except for circumstances not present here, a health care provider "may not maintain a cause of action in any forum within this state other than the [C]ommission for collection" of the health-related goods and services that are compensable under the Workers' Compensation Act. *Id.*

The power and jurisdiction of the Commission further extends to the determination of attorney fees: "In a case before the [C]ommission in which an attorney is employed, the [C]ommission has the full power to regulate and fix the fees of the attorney." Utah Code Ann. § 34A-1-309(1). Notably, this power extends to the ability to "award reasonable attorney fees on a contingency basis for medical benefits ordered paid. . . ." *Id.*, § 34A-1-309(4).[4]

The Law Firm contends that, despite this statutory language, the district court has jurisdiction, (1) under the Governmental Immunity Act of Utah (*see* Utah Code Ann. § 63G-7-501), and (2) because neither the Workers' Compensation Act nor the regulations promulgated thereunder "address . . . [or] regulate the attorney's fees . . . paid by any party other than the injured worker." Pltf's mem. re judgment on the pleadings, pp. 7-8. Both arguments fail.

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[3]The Utah Supreme Court has declared that this "jurisdiction" is exclusive with respect to "cases that fall within the purview of the Workers' Compensation Act." *Sheppick v. Albertson's, Inc.*, 922 P.2d 769, 773 (Utah 1996) (citations omitted).

[4]The Commission's power to award contingency fees based on an award of such medical benefits is not, however, unfettered. Utah Code Ann., § 34A-1-309(4).

As to the first argument, the Law Firm contends that "[t]he district courts have exclusive original jurisdiction over any action brought under . . . [the Governmental Immunity Act]." Utah Code Ann. § 63G-7-501. In making this argument, the Law Firm assumes that the Governmental Immunity Act applies to its claim for attorney fees, which is plainly equitable in nature. It does not.

> [I]t is well settled that there is no governmental immunity for equitable claims. *See American Tierra Corp. v. City of West Jordan*, 840 P.2d 757, 759 (Utah 1992) ("This court long has recognized a common law exception to governmental immunity for equitable claims. Neither the passage of time nor the enactment of the Utah Governmental Immunity Act has eroded this exception." (Citations omitted)).

Culberston v. Bd. of County Comm'rs of Salt Lake County, 2008 UT App 22, ¶ 20, 177 P.3d 621.

As to the second argument, it is true that "there may be certain common law claims under the [Workers' Compensation] Act that 'could be adjudicated only in the district court . . . [because] the Commission has neither the authority nor the jurisdiction to adjudicate [such claims]." *Working RX, Inc. v. Workers' Compensation Fund, et al.*, 2007 UT App 376, ¶ 173 P.3d 853 (quoting, *Sheppick*, 922 P.2d at 775-76 (some brackets in original, others added)).[5] But here, and as noted above, the Labor Commission plainly has the authority and jurisdiction to address all attorney fee issues: "In a case before the [C]ommission in which an attorney is employed, the [C]ommission has full power to regulate and fix the fees of the attorney." Utah Code Ann. § 34A-1-309(1) (emphasis added).

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[5]In *Sheppick* the plaintiff sought to bring a bad refusal to bargain against his employer and his employer's workers' compensation administrator in district court. The Supreme Court rejected this claim, holding that the facts plaintiff alleged "failed to establish district court jurisdiction to adjudicate such a claim." 922 P.2d at 776.

This sweeping language is not limited, as the Law Firm argues, to fees paid by the injured party. Rather, the provision comprehends all of the fees related to the workers' compensation litigation. *See Stokes v Flanders*, 970 P.2d 1260, 1264 (Utah 1998) ("On its face this provision gave the Commission broad authority to "regulate" and "fix" attorney fees. . . . "). Consequently, because the Commission has the power and jurisdiction to fix the Law Firm's fee, this court lacks jurisdiction. *See Id.* at 1265 ("[T]he Commission has exclusive jurisdiction to determine the lawfulness of attorney fees charged in cases brought before it, whether the case was successful or not."); *see also Sheppick*, 922 P.2d at 773 ("District courts have no jurisdiction whatsoever over cases that fall within the purview of the Worker's Compensation Act.") (citations omitted)

CONCLUSION

For the reasons set forth above, I grant the Hospital's motion and deny the Law Firm's motion. The case is dismissed. No further order is necessary to effectuate this decision.

DATED this 12th day of January, 2011.

BY THE COURT:

DENO G. HIMONAS
District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 100913499 by the method and on the date specified.

MAIL: HALSTON T DAVIS 4543 SOUTH 700 EAST SUITE 100 SALT LAKE CITY, UT 84107
MAIL: JEREMY L SHAW 160 E 300 S 5TH FL PO BOX 140853 SALT LAKE CITY UT 84114

Date: January 10, 2011

Deputy Court Clerk

ADDENDUM 2

Determinative Rules and Statutes

Utah Administrative Code

Labor Commission

Title R602. Adjudication

Rule R602-2. Adjudication of Workers' Compensation and Occupational Disease Claims

As in effect on March 1, 2011

R602-2-4. Attorney Fees

A. Pursuant to Section 34A-1-309, the Commission adopts the following rule to regulate and fix reasonable fees for attorneys representing applicants in workers' compensation or occupational illness claims.

1. This rule applies to all fees awarded after July 1, 2007.

2. Fees awarded prior to the effective date of this rule are determined according to the prior version of this rule in effect on the date of the award.

B. Upon written agreement, when an attorney's services are limited to consultation, document preparation, document review, or review of settlement proposals, the attorney may charge the applicant an hourly fee of not more than $125 for time actually spent in providing such services, up to a maximum of four hours.

1. Commission approval is not required for attorneys fees charged under this subsection B. It is the applicant's responsibility to pay attorneys fees permitted by this subsection B.

2. In all other cases involving payment of applicants' attorneys fees which are not covered by this subsection B., the entire amount of such attorneys fees are subject to subsection C. or D. of this rule.

C. Except for legal services compensated under subsection B. of this rule, all legal services provided to applicants shall be compensated on a contingent fee basis.

1. For purposes of this subsection C., the following definitions and limitations apply:

a. The term "benefits" includes only death or disability compensation and interest accrued thereon.

b. Benefits are "generated" when paid as a result of legal services rendered after Adjudication Form 152 Appointment of Counsel form is signed by the applicant. A copy of this form must be filed with the Commission by the applicant's attorney.

c. In no case shall an attorney collect fees calculated on more than the first 312 weeks of any and all combinations of workers' compensation benefits.

2. Fees and costs authorized by this subsection shall be deducted from the applicant's benefits and paid directly to the attorney on order of the Commission. A retainer in advance of a Commission approved fee is not allowed.

3. Attorney fees for benefits generated by the attorney's services shall be computed as follows:

a. For all legal services rendered through final Commission action, the fee shall be 25% of weekly benefits generated for the first $25,000, plus 20% of the weekly benefits generated in excess of $25,000 but not exceeding $50,000, plus 10% of the weekly benefits generated in excess of $50,000

to a maximum of $15,250.

b. For legal services rendered in prosecuting or defending an appeal before the Utah Court of Appeals, an attorney's fee shall be awarded amounting to 30% of the benefits in dispute before the Court of Appeals. This amount shall be added to any attorney's fee awarded under subsection C.3.a. for benefits not in dispute before the Court of Appeals. The total amount of fees awarded under subsection C.3.a. and this subsection C.3.b. shall not exceed $22,000;

c. For legal services rendered in prosecuting or defending an appeal before the Utah Supreme Court, an attorney's fee shall be awarded amounting to 35% of the benefits in dispute before the Supreme Court. This amount shall be added to any attorney's fee awarded under subsection C.3.a. and subsection C.3.b. for benefits not in dispute before the Supreme Court. The total amount of fees awarded under subsection C.3.a, subsection C.3.b. and this subsection C.3.c shall not exceed $27,000.

D. The following expenses, fees and costs shall be presumed to be reasonable and necessary and therefore reimbursable in a workers compensation claim:

1. Medical records and opinion costs;

2. Deposition transcription costs;

3. Vocational and Medical Expert Witness fees;

4. Hearing transcription costs;

5. Appellate filing fees; and

6. Appellate briefing expenses.

F. Other reasonable expenses, fees and costs may be awarded as reimbursable as the Commission may in its discretion decides in a particular workers compensation claim.

E. In "medical only" cases in which awards of attorneys' fees are authorized by Subsection 34A-1-309(4), the amount of such fees and costs shall be computed according to the provisions of subsection C and D.

Archive

Utah Statutes

Title 26. Utah Health Code

Chapter 19. Medical Benefits Recovery Act

Current through 2010 Legislative Session

§ 26-19-7. Notice of claim by recipient - Department response - Conditions for proceeding - Collection agreements - Department's right to intervene - Department's interests protected - Remitting funds - Disbursements - Liability and penalty for noncompliance

(1) (a) A recipient may not file a claim, commence an action, or settle, compromise, release, or waive a claim against a third party for recovery of medical costs for an injury, disease, or disability for which the department has provided or has become obligated to provide medical assistance, without the department's written consent as provided in Subsection (2)(b) or (4).

(b) For purposes of Subsection (1)(a), consent may be obtained if:

(i) a recipient who files a claim, or commences an action against a third party notifies the department in accordance with Subsection (1)(d) within 10 days of making his claim or commencing an action; or

(ii) an attorney, who has been retained by the recipient to file a claim, or commence an action against a third party, notifies the department in accordance with Subsection (1)(d) of the recipient's claim:

(A) within 30 days after being retained by the recipient for that purpose; or

(B) within 30 days from the date the attorney either knew or should have known that the recipient received medical assistance from the department.

(c) Service of the notice of claim to the department shall be made by certified mail, personal service, or by e-mail in accordance with Rule 5 of the Utah Rules of Civil Procedure, to the director of the Office of Recovery Services.

(d) The notice of claim shall include the following information:

(i) the name of the recipient;

(ii) the recipient's Social Security number;

(iii) the recipient's date of birth;

(iv) the name of the recipient's attorney if applicable;

(v) the name or names of individuals or entities against whom the recipient is making the claim, if known;

(vi) the name of the third party's insurance carrier, if known;

(vii) the date of the incident giving rise to the claim; and

(viii) a short statement identifying the nature of the recipient's claim.

(2) (a) Within 30 days of receipt of the notice of the claim required in Subsection (1), the department shall acknowledge receipt of the notice of the claim to the recipient or the recipient's attorney and shall notify the recipient or the recipient's attorney in writing of the following:

(i) if the department has a claim or lien pursuant to Section 26-19-5 or has become obligated to provide medical assistance; and

(ii) whether the department is denying or granting written consent in accordance with Subsection (1)(a).

(b) The department shall provide the recipient's attorney the opportunity to enter into a collection agreement with the department, with the recipient's consent, unless:

(i) the department, prior to the receipt of the notice of the recipient's claim pursuant to Subsection (1), filed a written claim with the third party, the third party agreed to make payment to the department before the date the department received notice of the recipient's claim, and the agreement is documented in the department's record; or

(ii) there has been a failure by the recipient's attorney to comply with any provision of this section by:

(A) failing to comply with the notice provisions of this section;

(B) failing or refusing to enter into a collection agreement;

(C) failing to comply with the terms of a collection agreement with the department; or

(D) failing to disburse funds owed to the state in accordance with this section.

(c) (i) The collection agreement shall be:

(A) consistent with this section and the attorney's obligation to represent the recipient and represent the state's claim; and

(B) state the terms under which the interests of the department may be represented in an action commenced by the recipient.

(ii) If the recipient's attorney enters into a written collection agreement with the department, or includes the department's claim in the recipient's claim or action pursuant to Subsection (4), the department shall pay attorney's fees at the rate of 33.3% of the department's total recovery and shall pay a proportionate share of the litigation expenses directly related to the action.

(d) The department is not required to enter into a collection agreement with the recipient's attorney for collection of personal injury protection under Subsection 31A-22-302(2).

(3) (a) If the department receives notice pursuant to Subsection (1), and notifies the recipient and the recipient's attorney that the department will not enter into a collection agreement with the recipient's attorney, the recipient may proceed with the recipient's claim or action against the third party if the recipient excludes from the claim:

(i) any medical expenses paid by the department; or

(ii) any medical costs for which the department is obligated to provide medical assistance.

(b) When a recipient proceeds with a claim under Subsection (3)(a), the recipient shall provide written notice to the third party of the exclusion of the department's claim for expenses under Subsection (3)(a)(i) or (ii)

(4) If the department receives notice pursuant to Subsection (1), and does not respond within 30 days to the recipient or the recipient's attorney, the recipient or the recipient's attorney:

(a) may proceed with the recipient's claim or action against the third party;

(b) may include the state's claim in the recipient's claim or action; and

(c) may not negotiate, compromise, settle, or waive the department's claim without the department's consent.

(5) The department has an unconditional right to intervene in an action commenced by a recipient against a third party for the purpose of recovering medical costs for which the department has provided or has become obligated to provide medical assistance.

(6) (a) If the recipient proceeds without complying with the provisions of this section, the department is not bound by any decision, judgment, agreement, settlement, or compromise rendered or made on the claim or in the action.

(b) The department may recover in full from the recipient or any party to which the proceeds were made payable all medical assistance which it has provided and retains its right to commence an independent action against the third party, subject to Subsection 26-19-5(3).

(7) Any amounts assigned to and recoverable by the department pursuant to Sections 26-19-4.5 and 26-19-5 collected directly by the recipient shall be remitted to the Bureau of Medical Collections within the Office of Recovery Services no later than five business days after receipt.

(8) (a) Any amounts assigned to and recoverable by the department pursuant to Sections 26-19-4.5 and 26-19-5 collected directly by the recipient's attorney must be remitted to the Bureau of Medical Collections within the Office of Recovery Services no later than 30 days after the funds are placed in the attorney's trust account.

(b) The date by which the funds must be remitted to the department may be modified based on agreement between the department and the recipient's attorney.

(c) The department's consent to another date for remittance may not be unreasonably withheld.

(d) If the funds are received by the recipient's attorney, no disbursements shall be made to the recipient or the recipient's attorney until the department's claim has been paid.

(9) A recipient or recipient's attorney who knowingly and intentionally fails to comply with this section is liable to the department for:

(a) the amount of the department's claim or lien pursuant to Subsection (5);

(b) a penalty equal to 10% of the amount of the department's claim; and

(c) attorney's fees and litigation expenses related to recovering the department's claim.

History. Amended by Chapter 103, 2005 General Session

Archive

Archive

Utah Statutes

Title 34A. Utah Labor Code

Chapter 1. Labor Commission Act

Current through 2010 Legislative Session

§ 34A-1-309. Attorney fees

(1) In a case before the commission in which an attorney is employed, the commission has full power to regulate and fix the fees of the attorney.

(2) In accordance with Title 63G, Chapter 4, Administrative Procedures Act, an attorney may file an application for hearing with the Division of Adjudication to obtain an award of attorney fees as authorized by this section and commission rules.

(3) (a) The commission may award reasonable attorney fees on a contingency basis when there is generated:

(i) disability or death benefits; or

(ii) interest on disability or death benefits.

(b) An employer or its insurance carrier shall pay attorney fees awarded under Subsection (3)(a) out of the award of:

(i) disability or death benefits; or

(ii) interest on disability or death benefits.

(4) (a) In addition to the attorney fees ordered under Subsection (3), the commission may award reasonable attorney fees on a contingency basis for medical benefits ordered paid in the same percentages for an award under Subsection (3) provided for in rule made by the commission in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, if:

(i) medical benefits are not approved by:

(A) the employer or its insurance carrier; or

(B) the Uninsured Employer's Fund created in Section 34A-2-704 ;

(ii) after the employee employs an attorney, medical benefits are paid or ordered to be paid;

(iii) the commission's informal dispute resolution mechanisms are reasonably used by the parties before adjudication; and

(iv) the sum of the following at issue in the adjudication of the medical benefit claim is less than $4,000:

(A) disability or death benefits; and

(B) interest on disability or death benefits.

(b) An employer or its insurance carrier shall pay attorney fees awarded under Subsection (4)(a)

in addition to the payment of medical benefits ordered.

History. Amended by Chapter 216, 2009 General Session

Archive

Utah Code
Title 34A Utah Labor Code
Chapter 2 Workers' Compensation Act
Section 106 Injuries or death caused by wrongful acts of persons other than employer, officer, agent, or employee of employer -- Rights of employer or insurance carrier in cause of action -- Maintenance of action -- Notice of intention to proceed against third party -- Right to maintain action not involving employee-employer relationship -- Disbursement of proceeds of recovery -- Exclusive remedy.

34A-2-106. Injuries or death caused by wrongful acts of persons other than employer, officer, agent, or employee of employer -- Rights of employer or insurance carrier in cause of action -- Maintenance of action -- Notice of intention to proceed against third party -- Right to maintain action not involving employee-employer relationship -- Disbursement of proceeds of recovery -- Exclusive remedy.

(1) When any injury or death for which compensation is payable under this chapter or Chapter 3, Utah Occupational Disease Act is caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of the employer:

(a) the injured employee, or in case of death, the employee's dependents, may claim compensation; and

(b) the injured employee or the employee's heirs or personal representative may have an action for damages against the third person.

(2) (a) If compensation is claimed and the employer or insurance carrier becomes obligated to pay compensation, the employer or insurance carrier:

(i) shall become trustee of the cause of action against the third party; and

(ii) may bring and maintain the action either in its own name or in the name of the injured employee, or the employee's heirs or the personal representative of the deceased.

(b) Notwithstanding Subsection (2)(a), an employer or insurance carrier may not settle and release a cause of action of which it is a trustee under Subsection (2)(a) without the consent of the commission.

(3) (a) Before proceeding against a third party, to give a person described in Subsections (3)(a)(i) and (ii) a reasonable opportunity to enter an appearance in the proceeding, the injured employee or, in case of death, the employee's heirs, shall give written notice of the intention to bring an action against the third party to:

(i) the carrier; and

(ii) any other person obligated for the compensation payments.

(b) The injured employee, or, in case of death, the employee's heirs, shall give written notice to the carrier and other person obligated for the compensation payments of any known attempt to attribute fault to the employer, officer, agent, or employee of the employer:

(i) by way of settlement; or

(ii) in a proceeding brought by the injured employee, or, in case of death, the employee's heirs.

(4) For the purposes of this section and notwithstanding Section **34A-2-103**, the injured employee or the employee's heirs or personal representative may also maintain an action for damages against any of the following persons who do not occupy an employee-employer relationship with the injured or deceased employee at the time of the employee's injury or death:

(a) a subcontractor;

(b) a general contractor;

(c) an independent contractor;

(d) a property owner; or

(e) a lessee or assignee of a property owner.

(5) If any recovery is obtained against a third person, it shall be disbursed in accordance with Subsections (5)(a) through (c).

(a) The reasonable expense of the action, including attorney fees, shall be paid and charged proportionately against the parties as their interests may appear. Any fee chargeable to

the employer or carrier is to be a credit upon any fee payable by the injured employee or, in the case of death, by the dependents, for any recovery had against the third party.

(b) The person liable for compensation payments shall be reimbursed, less the proportionate share of costs and attorney fees provided for in Subsection (5)(a), for the payments made as follows:

(i) without reduction based on fault attributed to the employer, officer, agent, or employee of the employer in the action against the third party if the combined percentage of fault attributed to persons immune from suit is determined to be less than 40% prior to any reallocation of fault under Subsection **78B-5-819**(2); or

(ii) less the amount of payments made multiplied by the percentage of fault attributed to the employer, officer, agent, or employee of the employer in the action against the third party if the combined percentage of fault attributed to persons immune from suit is determined to be 40% or more prior to any reallocation of fault under Subsection **78B-5-819**(2).

(c) The balance shall be paid to the injured employee, or the employee's heirs in case of death, to be applied to reduce or satisfy in full any obligation thereafter accruing against the person liable for compensation.

(6) The apportionment of fault to the employer in a civil action against a third party is not an action at law and does not impose any liability on the employer. The apportionment of fault does not alter or diminish the exclusiveness of the remedy provided to employees, their heirs, or personal representatives, or the immunity provided employers pursuant to Section **34A-2-105** or **34A-3-102** for injuries sustained by an employee, whether resulting in death or not. Any court in which a civil action is pending shall issue a partial summary judgment to an employer with respect to the employer's immunity as provided in Section **34A-2-105** or **34A-3-102**, even though the conduct of the employer may be considered in allocating fault to the employer in a third party action in the manner provided in Sections **78B-5-817** through **78B-5-823**.

Amended by Chapter 3, 2008 General Session
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<< Previous Section (34A-2-105) Next Section (34A-2-107) >>

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Utah Code
Title 34A Utah Labor Code
Chapter 2 Workers' Compensation Act
Section 207 Noncompliance -- Civil action by employees.

34A-2-207. Noncompliance – Civil action by employees.

(1) (a) Employers who fail to comply with Section **34A-2-201** are not entitled to the benefits of this chapter or Chapter 3, Utah Occupational Disease Act, during the period of noncompliance, but shall be liable in a civil action to their employees for damages suffered by reason of personal injuries arising out of or in the course of employment caused by the wrongful act, neglect, or default of the employer or any of the employer's officers, agents, or employees, and also to the dependents or personal representatives of such employees when death results from such injuries.

(b) In any action described in Subsection (1)(a), the defendant may not avail himself of any of the following defenses:

(i) the fellow-servant rule;

(ii) assumption of risk; or

(iii) contributory negligence.

(2) Proof of the injury shall constitute prima facie evidence of negligence on the part of the employer and the burden shall be upon the employer to show freedom from negligence resulting in the injury.

(3) An employer who fails to comply with Section **34A-2-201** is subject to Sections **34A-2-208** and **34A-2-212**.

(4) In any civil action permitted under this section against the employer, the employee shall be entitled to necessary costs and a reasonable attorney fee assessed against the employer.

Amended by Chapter 13, 1998 General Session
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<< Previous Section (34A-2-206) Next Section (34A-2-208) >>

Utah Code
Title 34A Utah Labor Code
Chapter 2 Workers' Compensation Act
Section 212 Docketing awards in district court -- Enforcing judgment.

34A-2-212. Docketing awards in district court -- Enforcing judgment.

(1) (a) An abstract of any final order providing an award may be filed under this chapter or Chapter 3, Utah Occupational Disease Act, in the office of the clerk of the district court of any county in the state.

(b) The abstract shall be docketed in the judgment docket of the district court where the abstract is filed. The time of the receipt of the abstract shall be noted on the abstract by the clerk of the district court and entered in the docket.

(c) When filed and docketed under Subsections (1)(a) and (b), the order shall constitute a lien from the time of the docketing upon the real property of the employer situated in the county, for a period of eight years from the date of the order unless the award provided in the final order is satisfied during the eight-year period.

(d) Execution may be issued on the lien within the same time and in the same manner and with the same effect as if said award were a judgment of the district court.

(2) (a) If the employer was uninsured at the time of the injury, the county attorney for the county in which the applicant or the employer resides, depending on the district in which the final order is docketed, shall enforce the judgment when requested by the commission or division on behalf of the commission.

(b) In an action to enforce an order docketed under Subsection (1), reasonable attorney's fees and court costs shall be allowed in addition to the award.

Renumbered and Amended by Chapter 375, 1997 General Session
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<< Previous Section (34A-2-211) Next Section (34A-2-301) >>